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No. 84-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BILL RODMAN, LARRY NOLAN AND SAMUEL MILLER, individually and as representatives of a class of persons who are qualified journeymen electricians and inside wiremen residing in Southwest Missouri who are not members of IBEW Local 453, but who have worked out of or sought to work out of the IBEW Local 453 referral or hiring hall or who have worked under collective bargaining agreements negotiated and administered by IBEW Local 453, during and since 1976,

Petitioners,

v.

JIM W. HENSLEY, MICHAEL BRUMLEY, GENE MCGHEE, PAT SHANKS, J.L. SMITH, JOHN D. PRICE, J.C. DANNER, R.D. PORTER, ROGER TESTERMAN, DENNIS ASHCRAFT, LEROY STILLEY, JACK F. MOORE, CARL TUTORINO, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, and LOCAL UNION 453, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MEMORANDUM FOR RESPONDENTS IN OPPOSITION [1]

[1] This brief is filed on behalf of all respondents. In this brief the Petition for Certiorari will be referred to as "Pet."; the Appendix to the Petition will be referred to as "Pet. App."; and the Joint Appendix filed with the United States Court of Appeals for the Eighth Circuit will be referred to as "J.A."

STATEMENT OF THE CASE

Because the Statement of the Case in the Petition for Certiorari is to a large extent inaccurate, and at times incoherent, respondents will as briefly as possible describe the procedural history of this case and the relevant facts.

A. Procedural History Of This Litigation

This action was filed on August 29, 1980. (J.A. 13-23) The complaint consisted of four counts and had three named plaintiffs, Bill Rodman, Larry Nolon, and Sam Miller. Counts One and Four sought relief for breach of the duty of fair representation under 29 U.S.C. § 185 and 28 U.S.C. § 1337. Counts Two and Three sought relief under the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, and 1988. Counts Three and Four also sought relief under unspecified theories of "Missouri common law."

Named as defendants were Local 453 of the International Brotherhood of Electrical Workers ("the Local"), the International Brotherhood of Electrical Workers, AFL-CIO ("the International"), and several individuals. Defendant Jack Moore is an International Vice-President of the IBEW, and defendant Tutorino is a member of Moore's staff. The other individual defendants are all either officers, former officers and/or members of the Local.

The defendants (respondents here) filed motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure which were granted in part on September 28, 1981. (J.A. 33-39) In that order the court limited the scope of the claims brought under the Civil Rights Act and also declined to exercise its pendent jurisdiction to hear plaintiffs' (petitioners here) state law claims. (J.A. 38) The court stated that it could not "determine whether it [had] the power to exercise the discretion to hear the plaintiffs' state claims since the

complaint does not attempt to set forth the state theories of recovery upon which plaintiffs intend to proceed". *Id.* The court added that it "cannot see or assume a relationship between plaintiffs' Missouri common law rights" and plaintiffs' federally-based claims. *Id.*

On August 6, 1982, the district court struck the class action allegations of Counts Two and Three. (J.A. 76) The court predicated its action on the fact that during the two years in which the case had been filed, petitioners had made no motion to certify the class nor conducted any discovery designed to demonstrate that the case should properly proceed as a class action.

Following extensive discovery, respondents filed summary judgment motions on July 1, 1983. Before responding to these motions, on August 4, 1983, the petitioners filed a motion for leave to file an amended complaint. They sought to add three new counts based upon the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401, *et seq.* (J.A. 304-316) In their suggestions in support of this motion, petitioners explained to the court that at the time the complaint was filed they had made a conscious decision not to raise any LMRDA claims, but that they now wished to change that decision.

On September 16, 1983, the District Court granted summary judgment to respondents (Pet. App. A4-A22) stating that:

> It is obvious from the pleadings and supporting affidavits that defendants' motions for summary judgment can be granted on numerous alternative theories.

(Pet. App. A6) The District Court held, *inter alia*, that the claims for breach of the duty of fair representation in Counts One and Four were barred by the six-month statute of limitations in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). (Pet. App.

A7-A8) The court also denied petitioners' motion for leave to file an amended complaint. (Pet. App. A17-A20)

Petitioners appealed but did not contest the dismissal of their claims under the Civil Rights Act. The Eighth Circuit affirmed on August 13, 1984, on the basis that petitioners' fair representation claims were clearly time-barred. (Pet. App. A1-A3) Petitioners' Petition for Rehearing was denied on October 26, 1984. (Pet. App. A25) A "motion to reconsider petition for rehearing" was denied on November 28, 1984. (Pet. App. A26)

B. Relevant Facts

Petitioners Bill Rodman and Sam Miller are members of Local Union 11 of the International Brotherhood of Electrical Workers, which is located in Los Angeles, California. Petitioner Larry Nolon is a member of Local 728 of the International Brotherhood of Electrical Workers, which is located in Ft. Lauderdale, Florida.

Local 453 of the International Brotherhood of Electrical Workers is headquartered in Springfield, Missouri, and its jurisdiction includes portions of southwest and central Missouri. At various times each of the three petitioners has sought employment through the hiring hall operated by Local 453 and governed by the collective bargaining agreements entered into by Local 453.

The referral procedure utilized by Local 453's hiring hall is set forth in the collective bargaining agreement between Local 453 and the Springfield Division, Kansas City Chapter of the National Electrical Contractors Association, Inc. (NECA). (See Attachment B to the Appendix to the International Brotherhood of Electrical Workers' motion for summary judgment, filed July 1, 1983.) That collective bargaining agreement establishes four separate categories for employment referral. Applicants who qualify for higher groups are referred to jobs before those on the lower groups. Those in Group I, which receive the highest priority, include journeyman

wiremen with at least four years' experience in the trade, who live in the appropriate geographical area and who have worked for at least one year in the previous four under an agreement between Local 453 and NECA. Group II includes all journeymen wiremen with four or more years' experience in the trade. Group III includes all those with at least two years experience in the trade, living in the appropriate geographical area who have worked at least six months in the last three years under an agreement between Local 453 and NECA. Group IV includes all those who have worked at the trade for at least one year.[2]

The collective bargaining agreement also contains a non-discrimination clause. The contract states:

> The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union and such selection and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of union membership policies or requirements.

The agreement also establishes a grievance procedure available to all employees and applicants for referral, under which complaints regarding the administration of the hiring hall are considered by an Appeals Committee consisting of a union representative, an employer representative and a public member.

On or about February 28, 1978, Rodman and Nolon met with International Vice-President Moore at his office in Springfield, Missouri. Rodman and Nolon complained that Jim Hensley, [illegible] Business Manager of Local 453 at the time, had refused to allow Nolon and Rodman to

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[2] The Petition for Certiorari incorrectly describes the referral procedure as one in which only members of Local 453 are permitted to register for Group I and Group II is for members of other Locals. (Pet. 4)

register for Group I for which both Rodman and Nolon felt they qualified. Moore asked Rodman and Nolon to put their complaints in writing, which they did in separate letters dated March 2, 1978. Moore responded in writing on March 6, 1978, advising Rodman and Nolon of the existence of the grievance procedure in the collective bargaining agreement, and suggesting they pursue their complaint by filing a grievance with the Appeals Committee. (J.A. 254, 255) Rodman and Nolon did file a complaint or grievance with the Appeals Committee on April 21, 1978. After a hearing, the Appeals Committee issued a decision on July 3, 1978 holding that Rodman and Nolon should be permitted to register for Group I, and both were thereafter allowed to register for that Group. (J.A. 220-225)

Rodman filed a second grievance with the Appeals committee on June 15, 1979. This grievance challenged a rule promulgated by Local 453 requiring individuals to return to Local 453's jurisdiction every two weeks to re-sign the hiring hall registry. An arbitration decision issued on October 8, 1979 found no evidence of discrimination and held that the grievance was moot because Local 453 had already abandoned the challenged rule. (J.A. 220-221, 227-233)

Rodman filed a third grievance on March 7, 1980. In that grievance Rodman claimed that the hiring hall had subjected him to discrimination in job referrals during January, February and March of 1980. The Appeals Committee found no evidence to support Rodman's charge of discrimination and denied his grievance. (J.A. 234-239) This decision issued on or about January 22, 1981. (J.A. 220-221)

Larry Nolon did not file any grievances with the Appeal Committee other than the original grievance filed with Rodman's in April of 1978. (Nolon Depo., pp. 80-81) Nolan made no attempt to register for Group I or obtain a referral to employment from Local 453's hiring

hall after July or August of 1979. (Nolon Depo., p. 35, 219) Any claim of discrimination made by Nolon regarding the administration of Local 453's hiring hall was based upon events which occurred prior to August 13, 1979. (Nolon Depo., p. 219)

Samuel Miller never filed a grievance with the Appeals Committee. He requested the right to register for Group I in March of 1979 and was allowed to do so later that month. (See generally, Miller Depo., pp. 13-16).

To a large extent, the actions challenged by the plaintiffs in this case were also the subject of three separate unfair labor practice complaints which were ruled upon by the National Labor Relations Board and the Eighth Circuit. These cases resulted in orders remedying those actions deemed unlawful and prohibiting any future occurrence. As the district court stated in this case:

> Three cases before the NLRB have dealt extensively with the conduct sought to be restricted in the case at bar: *Sachs Electric, Donald Jones and IBEW, Local Union 453*, Case No. 17-CB-1921 (1980), 248 NLRB No. 92, 104 LRRM 1070 enf'd as modified, 668 F.2d 991, 109 LRRM 2524 (8th Cir. 1982); *IBEW Local 453 and Southern Sun Electric Corp.*, Case No. 17-CB-2192 (1982); and *IBEW, Local 453 and Bill Rodman*, Case No. 17-CB-2269, 258 NLRB No. 195, 108 LRRM 1221 (1981), enfd 696 F.2d 999, 112 LRRM 2896 (8th Cir. 1982). All three actions resulted in extensive protective orders being issued that would effectively protect plaintiffs' rights as guaranteed by the NLRA.

(Pet. App. A11)

ARGUMENT

The United States Court of Appeals for the Eighth Circuit in this case applied the six-month limitation period of Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), to the petitioners' duty of fair representation claim, as required by this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983). The court of appeals applied the six-month limitation period despite the fact that petitioners' suit was filed before *DelCostello* was decided. In that respect, the decision below is consistent with the overwhelming majority of courts of appeals which, with only one exception, have applied the holding in *DelCostello* to such suits. *Smith v. General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984); *Graves v. Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko v. U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.), *cert. denied*, 53 U.S.L.W. 3403 (1984); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (7th Cir. 1983), *cert. denied*, 53 U.S.L.W. 3289 (1984); *Lincoln v. District 9 Machinists*, 723 F.2d 627 (8th Cir. 1984); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983); *cert. denied*, 53 U.S.L.W. 3289 (1984); *Perez v. Dana Corp.*, 718 F.2d 581 (3d Cir. 1984); *Edward v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Ernst v. Indiana Bell Telephone Co.*, 717 F.2d 1036 (7th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3509 (1984). *Contra, Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560 (9th Cir. 1984). And, as the foregoing citations demonstrate, this Court has on several occasions considered whether the conflict caused by the Ninth Circuit's erroneous, contrary view requires resolution by the Court and has determined that the issue is not of sufficient importance to support a grant of certiorari.

Apparently, recognizing that no basis exists for granting a petition for certiorari on the central issue presented by the Eighth Circuit's decision in this case, petitioners have raised a series of peripheral issues in an attempt by

sheer volume to create an appearance of substance. But those issues generally turn on the specific facts of this case or the manner in which the district court chose to exercise its discretion. No important questions of federal law are presented, and no conflict exists with decisions of other courts of appeals on any of these issues. Accordingly this Court should deny the petition for a writ of certiorari.

1. The petitioners first argue that the Eighth Circuit incorrectly applied *DelCostello* because this action is a duty of fair representation suit against a labor organization rather than a "hybrid" duty of fair representation/breach of contract action against both a labor organization and an employer. (Pet. 13) Yet this Court's decision in *DelCostello* is not limited to "hybrid" suits, and no court has ever declined to apply *DelCostello* to a duty of fair representation suit against only a union. Indeed at least two courts of appeals have applied *DelCostello* to such suits.

In *DelCostello* this Court reviewed two suits in which plaintiffs had sued a union for breach of the duty of fair representation and an employer for breach of the collective bargaining agreement. The Court in *DelCostello* held "that § 10(b) [of the National Labor Relations Act] should be the applicable statute of limitations governing the suit, both against the employer and against the union." *Id.* at 155. The first and foremost reason for adopting Section 10(b) as the applicable statute of limitations was the similarity between an unfair labor practice and a breach of the duty of fair representation:

> The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices. . . . Even if not all breaches of the duty are unfair labor practices, however, the family resemblance is undeniable, and indeed there is a substantial overlap. Many fair representation claims (the one in No. 81-2386, for example) include

> allegations of discrimination based on membership status or dissident views, which would be unfair labor practices under § 8(a)(1) or (2). Aside from these clear cases, duty-of-fair-representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions—as are virtually all unfair labor practice charges made by workers against unions.

Id. at 170. The Court did not limit its decision to "hybrid" duty of fair representation/breach of contract suits. The Court acknowledged that an employee could choose to sue either a union or employer separately and emphasized the need for consistency and avoiding "knotty problems of categorization and consistency." *Id.* at 165, 166 n.16.

The similarity of a duty of fair representation suit to an unfair labor practice case is, if anything, even stronger in a suit based only upon the duty of fair representation. In *DelCostello* this Court adopted Section 10(b) because "[m]any fair representation claims . . . include allegations of discrimination based on membership status or dissident views, which would be unfair labor practices." *Id.* at 170. In this case petitioners' fair representation claims include allegations of discrimination based on membership status and dissident views which to a large extent already have been litigated before the NLRB and the Eighth Circuit in unfair labor practice cases. Thus no logical basis exists for arguing that the statute of limitations deemed applicable in *DelCostello* is inapplicable here.

At least two other courts of appeals have reached the same conclusion. In *Erkins v. Steelworkers*, 723 F.2d 837 (11th Cir. 1984) the Eleventh Circuit rejected the argument that the six-month limitation period applied only to "hybrid" actions. The court acknowledged that the "similarity of rights and considerations [upon which *DelCostello* was based] exists even more clearly when a claim-

ant brings only a breach of duty of fair representation claim against a union." *Id.* at 838. In addition, the Seventh Circuit has applied *DelCostello* in two duty of fair representation actions which did not include breach of contract claims against employers. *Lewis v. Laborers Local 100*, —— F.2d ——, 118 LRRM 2146 (7th Cir. 1984); *Freeman v. Local 135, Teamsters*, 746 F.2d 1316 (7th Cir. 1984).

Moreover, no court has ever declined to apply *DelCostello* in a duty of fair representation suit because that suit did not include a breach of contract claim. In support of their argument petitioners cite a district court decision, *Gordon v. Winpisinger*, 581 F. Supp. 234 (E.D.N.Y. 1972) which does state that *DelCostello* applies only to "hybrid" actions. *Gordon*, however, involved an alleged violation of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*, rather than a breach of the duty of fair representation. The district court's brief (and inaccurate) characterization of *DelCostello* in that context hardly creates a conflict among the courts of appeals or raises an important question of federal law.

2. In a second attempt to avoid the application of the six-month limitation period required by *DelCostello*, petitioners argue that this case involves a continuing violation of the duty of fair representation which is not barred by any statute of limitations. (Pet. 13-18) Petitioners contend that the decision of the Eighth Circuit conflicts with *Lewis v. Laborers Local 100*, —— F.2d ——, 118 LRRM 2146 (7th Cir. 1984), in which the Seventh Circuit held that a duty of fair representation claim based upon hiring hall discrimination was improperly dismissed. Yet an examination of *Lewis* shows that no conflict exists. Moreover, whether a particular case presents a continuing violation is a fact-specific determination in each case which has little effect other than on the parties to that case. Such determinations do not present important questions of federal law.

In their discussion of *Lewis* the petitioners ignore the crucial procedural distinction between that case and this one. In *Lewis* the district court granted, on statute of limitations grounds, defendants' motion to dismiss the plaintiff's duty of fair representation claim alleging hiring hall discrimination. The Seventh Circuit reversed because the complaint had alleged that the plaintiff had been subjected to discrimination "since February 1980" and, on a motion to dismiss, the court could not consider facts other than those alleged in the complaint. Because the plaintiff had alleged a continuing violation, granting a motion to dismiss on statute of limitations grounds was improper. The Seventh Circuit, however, expressly acknowledged that dismissal might be appropriate at a later stage in the case if the district court found that no breach of the duty of fair representation occurred within the applicable six-month limitation period:

> Notwithstanding the foregoing analysis, we hold only that Lewis' complaint should not have been disposed of on a motion to dismiss.
>
> * * * *
>
> Thus, we hold that Lewis has alleged a continuing violation sufficient to toll the statute of limitations at least until March 23, 1982. Nonetheless, on remand the district court may find that the continuing violation stopped prior to six months before the original complaint was filed. If the court so finds, the action is time-barred.

Id. at 2155.

The instant case was *not* disposed of on a motion to dismiss. The court granted a motion for summary judgment which followed several years of extensive discovery. The district court properly concluded that, regardless of the allegations in the complaint, all of "[t]he alleged incidents in the case at bar took place in or about 1977 through 1978" (Pet. App. A7) and that this suit, filed in August 1980, was therefore time-barred. Such a con-

clusion is hardly inconsistent with the decision in *Lewis*, since the Seventh Circuit in that case specifically stated that on remand the district court could find that the suit was time-barred because no act of discrimination took place during the six months preceding the filing of that suit.[3]

Moreover, whether a particular set of facts constitutes a continuing violation sufficient to avoid application of a statute of limitations is hardly an important federal question. To a large extent the basic principles to be followed in applying the continuing violation doctrine in

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[3] In an attempt to demonstrate the existence of a continuing violation petitioners grossly mischaracterize two Tenth Circuit decisions, *Robertson v. NLRB*, 597 F.2d 1331 (10th Cir. 1979), and *NLRB v. IBEW Local 322 (Bechtel Power Corp.)*, 597 F.2d 1326 (10th Cir. 1979). In *Robertson* the court held that Section 8(f) of the NLRA, 29 U.S.C. § 158(f), did not protect a portion of a referral system under which an IBEW local union hiring hall gave preference in referrals to employees who had worked for any employer who was a party to, or had adopted the terms of, a multiemployer agreement. The NLRB had reached the opposite conclusion, *Interstate Electric Co.*, 227 NLRB 1225 (1977), and subsequently declined to adopt the Tenth Circuit's interpretation of Section 8(f). *Teamsters Local 83 (Associated General Contractors)*, 243 NLRB 328, 330 n.8 (1979). Petitioners, however, cite *Robertson* for the proposition that the four-group system of referral utilized IBEW local unions is a "flagrant *per se* violation of the duty of the Union to fairly represent the employees merely because of their lack of membership in the Union." (Pet. 14) In *NLRB v. IBEW Local 322*, the Tenth Circuit enforced an NLRB decision finding that an IBEW local union committed an unfair labor practice by refusing to refer nonunion applicants and permitting such applicants to be hired only as temporary employees. Petitioner's cite this case for the proposition that a union operating a hiring hall has "an obligation . . . to affirmatively *offer* traveler's the opportunity to sign Book I, the highest referral priority, so such travelers will know they are not required to take second class status in hiring hall referrals merely because they are members of some other Local." (Pet. 15, emphasis in original) Neither *Robertson* nor *IBEW Local 322* support the inaccurate and misleading propositions for which they are cited.

cases governed by Section 10(b) of the NLRA have been settled by this Court's decision in *Local Lodge 1423 Machinists v. NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960) (continued enforcement of union security clause included in collective bargaining agreement entered into by union that did not represent majority of employees was not a continuing violation).

As *Bryan* and subsequent cases demonstrate, determining whether a particular case presents a continuing violation requires a careful examination of the facts and the wrong alleged to have been committed. *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299 (7th Cir. 1983) (union's failure to file a grievance alleged to be breach of duty of fair representation not a continuing violation); *General Marine Transport Corp. v. NLRB*, 619 F.2d 180 (2d Cir. 1980) (employer's repudiation of collective bargaining agreement not a continuing violation); *NLRB v. Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964) (refusal to supply union with pension information not a continuing violation). Thus, even if some basis existed for petitioners' claim that respondents in this case had committed a continuing violation of the duty of fair representation, the determination of that fact-specific claim would not constitute an important question of federal law warranting this Court's attention.

3. Petitioners also contend that the decision in this case conflicts with the Fifth Circuit's 1974 decision in *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974), holding that the filing of an unfair labor practice charge with the NLRB tolled the running of the statute of limitations applicable to an action under 42 U.S.C. § 1981 based upon the same facts. Yet the analysis on which the court in *Guerra* is based has since been rejected by this Court as the Fifth Circuit itself has recognized.

In *Guerra* the Fifth Circuit held that the filing of a charge with the EEOC tolled the limitation period ap-

plicable to an action under 41 U.S.C. § 1981 because "Congress intended Title VII to be an important, but not the only, weapon in the arsenal against employment discrimination", *id.* at 650, and because tolling would "encourage adjustment and settlement of grievances short of courtroom litigation." *Id.* The Fifth Circuit also stated that "this reasoning supplies a persuasive anlogy", *id.*, to a case in which an unfair labor practice case is filed prior to the initiation of a Section 1981 action and held, therefore, that the filing of such a charge tolls the limitation period applicable to a Section 1981 suit.

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court rejected the reasoning of the Fifth Circuit in *Guerra* and held that filing a charge with the EEOC does not toll the statute of limitations applicable to an action under 42 U.S.C. § 1981. The Court reached that conclusion because "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 461. The Court also found "no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently." *Id.* at 466.[4]

As the Fifth Circuit has acknowledged, this Court's decision in *Johnson* overruled *Guerra*. *Williams v. Phil Rich Fan Manufacturing Co., Inc.*, 552 F.2d 596 (5th Cir. 1977). Thus the analysis of *Guerra*, upon which the Fifth Circuit based its conclusion that filing either an EEOC charge or an unfair labor practice charge would toll the limitation period in a Section 1981 suit, has been repudiated. No basis therefore exists for contending that filing an unfair labor practice charge with the NLRB tolls the limitation period applicable to a duty of fair

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[4] The following year, in *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1970), the Court held the utilization of a collective bargaining grievance procedure does not toll the running of the limitations period applicable to the filing of a charge with the EEOC.

representation suit filed in a district court, and no conflict currently exists among the courts of appeals on that issue.

4. Petitioners also contend that a conflict among the courts of appeals was created by the failure of the Eighth Circuit and district court to interpret the complaint in this case to encompass the third Appeals Committee proceeding, which took place after the complaint was filed. (Pet. 22-23) Yet the petitioners do not cite *any* decision of *any* court of appeals in conflict with the decision below, and in fact, do not cite any authority whatsoever supporting the notion that a complaint must be interpreted to include events occurring after the complaint is filed.[5] In this case the district court's interpretation was a reasonable one since the 1980 grievance was not mentioned in the complaint; after the decision was issued plaintiff never asked for leave to file an amended complaint attacking that decision; and plaintiff's 110-page proposed pretrial order filed in June 1983 setting forth all matters which plaintiffs considered at issue made no mention of the 1980 grievance. Accordingly, the district court's interpretation of the complaint as excluding events occurring after the complaint was filed does not

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[5] Petitioners cite *ACRI v. Machinists*, 118 LRRM 2112 (N.D. Cal. 1983) as a case in which the complaint was interpreted to include matters submitted to an arbitrator whose decision issued after the complaint was filed. In that case, however, the complaint filed before the decision issued was "dismissed without prejudice as prematurely filed." *Id.* at 2112. Petitioners also cite *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959) in which this Court held that a complaint issued by the NLRB General Counsel could be based upon events occurring after the filing of the unfair labor practice charge initiating the Board's investigation. That case, however, offers the petitioners no support since, as the Court recognized in *Fant Milling*, "[a] charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit." *Id.* at 307.

provide a basis for granting the petition for certiorari in this case.[6]

5. Petitioners also challenge the district court's denial of their motion to file an amended complaint. Although leave to amend "shall be freely given when justice so requires," *Foman v. Davis*, 371 U.S. 178, 182 (1962), the decision to grant such leave is within the discretion of the district court. *Id.* Whether a district court has abused that discretion in any particular case will ultimately depend on the facts and circumstances of that case. The manner in which that discretion is exercised in an individual case hardly raises an important issue of federal law warranting review by this Court.

Moreover, the denial of leave to file an amended complaint adding three counts which is filed shortly before trial in a case which has been pending for nearly three years and in which extensive discovery has been completed, is not an abuse of discretion. The court found that the plaintiffs were well aware of their potential LMRDA claims years before the case was filed and made a conscious decision to forego those claims and pursue others. Allowing the amendment clearly would have delayed significantly the disposition of the case and greatly increased the already quite expensive cost of litigation. Thus there was ample reason to deny petitioners leave to file the amended complaint, and that denial does not provide any basis for review by this Court.

6. Finally, no basis exists for review of the district court's refusal to exercise pendent jurisdiction to hear petitioners unspecified state law claims. "It has consist-

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[6] The petition for certiorari also refers to evidence of fraudulent concealment which petitioners claim should have been sufficient to toll the statute of limitations. (Pet. 23) Yet the decisions in the unfair labor practice cases, which petitioners cite as supporting this claim, do not contain any evidence of conduct constituting fraudulent concealment.

ently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Mine Workers v. Gibbs*, 383 U.S. 715, 716 (1966). The district court in this case determined not to exercise its discretion to hear petitioners state law claims because petitioners had failed to set forth their state theories of recovery and the court could not therefore determine whether the appropriate nexus existed between the state and federal claims. The refusal to exercise pendent jurisdiction in such circumstances cannot be deemed an abuse of discretion.

CONCLUSION

For all the foregoing reasons this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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